SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Collier's Encyclopedia 1965, Volume 11, page 609, column 1 11

Encyclopedia Britannica, Volume 2, page 7 (Fourteenth Edition) 11

Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Relations, 34 Fordham Law Review 71 .. 25

Halkett and Laing, *Dictionary of Anonymous and Pseudonymous English Literature* (1926) 11

Taylor and Mosher, *The Biographical History of Anonyma and Pseudonyma,* University of Chicago Press (1951) 11

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Opinions Below

The opinion, concurring opinion and dissent in the District Court (R. 19-33, 35-44) are reported in 261 Fed. Supp. 985.

Jurisdiction

The order of the three-judge district court was made and entered on September 29, 1966. The notice of appeal to this court was filed in the district court on October 28, 1966. The jurisdiction of this court is conferred by 28 U.S.C. Section 1253.

Questions Presented

1. Is Section 781-b of the Penal Law of the State of New York repugnant to the Constitution of the United States in that it is a restraint on freedom of expression?

2. Should the District Court have abstained from deciding the constitutional question squarely involved under the Constitution of the United States?

3. Should the District Court have dismissed the amended complaint without rendering judgment on the merits of appellant's constitutional claims?

Statute Involved

The statute involved is Section 781-b of the Penal Law of New York (McKinney's Consolidated Laws of New York, volume 39).

Section 781-b:

> "No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof

and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

"The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal." L. 1941 ch. 198.

Section 782 provides as follows:

"Any person convicted of a misdemeanor under this article shall for a first offense be punished by imprisonment for not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment. Any person convicted of a misdemeanor under this article for a second or subsequent offense shall be guilty of a felony."

Statement

The appellant commenced this action on April 22, 1966 for a declaratory judgment and injunction in the United States District Court for the Southern District of New

York. The appellant alleged that he had been previously convicted for a violation of Section 781-b in that he had distributed an anonymous leaflet commenting upon a candidate for the Congress of the United States. Upon his appeal, his conviction was reversed because of the insufficiency of the evidence. Thereafter, the appellee as district attorney pursued the case to the Court of Appeals, the highest court in New York, which affirmed the reversal of the conviction, without opinion, *People* v. *Zwickler,* 16 N. Y. 2d 1069. The appellant, however, in expectation of a renewal of the candidacy of that person wishes to renew the distribution by him of the anonymous leaflet. But he was mindful of his previous conviction and his involvement in a prior prosecution all the way to the Court of Appeals. He was also mindful that the statute is such that a second conviction under it is a felony, with all its attendant disabilities in New York. He therefore fears to make distribution. He will not risk another prosecution and has thus been prevented from making distribution. Because of this fear he refrained from distribution during the 1966 election and while this litigation was pending. His interest in expressing himself is thus chilled by the perils and difficulties associated with such expression.

He also alleged that the appellee is a diligent prosecutor who had previously pursued him to the Court of Appeals and intends to again prosecute him and that because of the threats of prosecution of him, the appellant fears to exercise his right of expression by the distribution of the anonymous leaflet. Appellant alleges that he desires to distribute the leaflet in large quantities during the 1966 (the complaint was filed in April 1966) and subsequent election campaigns or in connection with the election of party officials, nominations for public office and party position that may occur *after* 1966.

He therefore prayed that the court declare Section 781-b to be repugnant to the Constitution of the United States and to enjoin its enforcement.

The appellant moved for an interlocutory injunction and for the convening of a three-judge statutory court. The appellee moved to dismiss the complaint on the ground that it did not state a claim upon which relief could be granted.

The motion to convene a three-judge court was granted. It was convened and a hearing was held. That court by a vote of 2-1 denied relief to the appellant and granted appellee's motion to dismiss the amended complaint.

It should be added that at the hearing counsel stipulated that the court should treat the hearing as one for final judgment (R. 17-18). Indeed, the facts are matters of public record (*People* v. *Zwickler*, 16 N. Y. 2d 1069).

The majority held that although it had jurisdiction, it should nevertheless abstain from granting the relief. Judge Rosling in a dissenting opinion held that since it was clear that the statute was unconstitutional as an infringement of appellant's freedom of expression, and also a denial of due process by overbroadness, the decisions of this court commanded that relief should be afforded to appellant.

Summary of Argument

To satisfy any rule that demands a clear showing of the unconstitutionality of a state statute before a district court should exercise its equitable jurisdiction, the appellant takes up the substantive question first.

He argues that the statute is repugnant to the Constitution because it is a restraint on free expression. Conceding the statute is directed against libelous and false statements, as urged by the appellee below, the statute nevertheless suppresses literature. The effect of the statute is suppression akin to suppression of seditious libel. At least in the case of seditious libel the aim is directed at the con-

tent of the literature. In the case of anonymity the aim is misdirected; the target is an historically protected mode of expression.

Since at least since *Thomas* v. *Collins,* 323 U. S. 516, this court has held that there can be no state requirement that a person who speaks orally in public should be required to identify himself. Likewise, written statements should not be required disclosure of their author. We urge that *Talley* v. *California,* 362 U. S. 60 teaches the principle, that all anonymous utterances are protected.

From a practical point of view, it is impossible for an author to determine *in advance* whether the writing he wishes to publish anonymously will meet with approval with this statute, construed as urged by appellee. Nor is it possible from a practical point of view for him to get a declaratory judgment in advance. Consequently, he would, in fear of the statute, be discouraged from publishing. The very existence of the statute produces the chill.

As to the decision of the district court to abstain, appellant contends that the recent decisions of this court in several cases have announced that a three-judge court convened to pass upon the constitutionality of a state statute should not obstain when a First Amendment claim is made. This is especially true when the statute is attacked on its face, since this court has rejected abstention even in cases of unconstitutional application of a statute.

The emphasis on the exercise of jurisdiction is the need for an expeditious determination of the validity of a statute which restrains expression, for delay in such cases usually spells destruction of the right of expression.

ARGUMENT

I

The statute, even if construed to apply to obnoxious literature, is an unconstitutional restraint on expression.

Analysis of the statute discloses that it is directed against anonymous material when disseminated in connection with:

(1) any election of public officers

(2) party officials

(3) candidates for nomination for public office

(4) party position

(5) proposition or amendment to the state constitution; concerning the following:

(a) a political party

(b) candidates

(c) committee

(d) person

(e) proposition to the state constitution

(f) amendment to the state constitution.

The statute does not textually speak against false or libelous statements.

This point assumes that even if the statute contained such words or were construed to prohibit anonymous literature (appellee urged below) that was false or libelous, nevertheless, such a statute operates as a restraint upon the dissemination of literature.

This court in *Talley* v. *California,* 362 U. S. 60, held that a statute which forbade the dissemination of anonymous pamphlets was repugnant to the Constitution. There, the statute did not isolate the type of anonymous literature forbidden (see also, *People* v. *Mishkin,* 17 A. D. 2d 243; affd. 15 N. Y. 2d 671 and the subsequent amendment of the statute by the Laws of 1963, Chapter 703).

In *Talley,* a Los Angeles ordinance forbade distribution of handbills which did not have printed on their face the name and address of the printer and the person who caused distribution and sponsorship of the handbill. The defendant was arrested for violating the ordinance in that he had distributed a handbill of the National Consumers Mobilization which urged a boycott against certain businessmen who were named, because they carried products of manufacturers who would not offer equal employment to Negroes, Mexicans and Orientals. The Appellate Department of the Superior Court of the County of Los Angeles rejected defendant's contention that the ordinance invaded freedom of speech under the Fourteenth and First Amendments. This court held the ordinance unconstitutional, as too broad and in no way limited to pamphlets whose contents were obscene or offensive to public morals or advocated unlawful conduct.

This court held that the statute was not limited either by its text or legislative history to a means of identifying those responsible for fraud and libel. Therefore, this court did not pass on the validity of an ordinance limited to prevent those evils. "The ordinance bars all handbills under all circumstances anywhere."

This court, in a recent series of cases, consistently followed and reaffirmed the principle that disclosure cannot be compelled when reprisals or injury will result. *Bates* v. *Little Rock,* 361 U. S. 516 and *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449, in which the court held that persons associated to

disseminate ideas could not be compelled to identify the members; *Shelton* v. *Tucker,* 364 U. S. 479, where an individual teacher, as distinguished from the group in the *Bates* and *NAACP* cases, could not be required to identify organizations in which he was a member. *Lamont* v. *Postmaster General,* 381 U. S. 301, in which this court struck the requirement that a recipient of a publication disclose himself.

The force of these decisions is not attenuated by older decisions, such as *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, where disclosure was required for the exercise of the privilege of the use of second-class mail; and *United States* v. *Harriss,* 347 U. S. 612, requiring identification of lobbyists before Congress. These cases can be distinguished: The *Lewis* case in that the privilege might be renounced, as the price, though a heavy one, by one who sought anonymity. The periodical could resort to anonymity, without suppression, by government fiat, if it wished to pay the price. An entirely different case would arise if all anonymous mailings were barred. And it should not be overlooked that even periodicals enjoying second class mail privileges, nevertheless carry articles and letters that are anonymous. The *Harriss* case deals with a special situation relating to Congress. It does not compel disclosure to the public in general, but merely to members of Congress. In any event, if these cases cannot be so distinguished, it can be said they have been disregarded or perhaps overruled *sub silentio* by the subsequent decisions.

The fact that 36 states have similar laws to the statute under attack, does not render this statute immune from attack as "the overwhelming public policy of the Nation" (Justice Clark dissenting in *Talley,* p. 70). In *Winters* v. *New York,* 333 U. S. 507 (see dissent of Justice Frankfuter), a statute was 60 years old and at least 20 states had similar statutes. Yet this court found the statute repugnant to the Constitution.

Nor is it necessary that the distributor, as his burden, furnish proof of economic reprisal, loss of employment or physical danger. It is sufficient that reprisal is inherent in the act of anonymous dissemination. What the First Amendment aims at is the chilling effect of the fear of dissemination that would result from a compelled disclosure.

Here, the statute is more particularized than that in *Talley*. From the analysis, it is readily discernible that the subject matter of the statute is that most readily protected by the First Amendment. The subjects are candidates for public office, political parties and amendments to the state constitution. Of all discussions within the intendment of free speech, these are the most favored!

Yet, this statute is specific in condemning anonymous criticism of persons of public interest, in a manner akin to seditious libel. True, the statute does not, as in seditious libel, proscribe the content of the writing. It restricts itself to condemning anonymous criticism. We contend, however, that the operation of the statute is to create a restraint which has the effect of a seditious libel statute.

Although *Talley* v. *California* is a decision limited as to the scope of the statute, nevertheless, it guides this case. There, it was pointed out how large a part anonymous literature has played in history, especially in political life. The *Federalist** and *Junius' Letters* are some of the examples of 18th century political activity. Indeed, the history of the formative stage of the United States reveals a period of most frequent publication of anonymous and

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* Had this law been in effect in the days of Hamilton and Jay, New York lawyers, serious difficulty would have been their lot, because of their multiple contributions to the Federalist Papers, which they published anonymously under the title of "An Address to the People of the State of New York", 12 Encyclopedia Britannica, page 981, "John Jay". Under the statute, a second conviction is a felony, which to a lawyer means automatic disbarment (Judiciary Law, Section 88 (3)).

scurrilous literature dealing with political candidates and constitutional provisions, so much so that Washington and Jefferson writhed under the discomforts produced by free speech. Bleyer, History of American Journalism, 23, 79, 90-93. Collier's Encyclopedia 1965, Volume 11, page 609, column 1.

Anonymity has had a history as long as the history of literature itself. Since religion pervaded early history, it is not surprising that heresy (or the dissent from current popular views) sought anonymity. And this history has extended to our times where blacklisting and other reprisals haunt the author of unpopular and perhaps erroneous views.

The catalog of anonymous literature is a long one. Some of it appears in the *Talley* case. It would serve no purpose in this brief in an elaborate display of its history, for it is a matter well within the knowledge of this court. Besides Bleyer, *op. cit.*, the following contain material that points up the long history of anonymous publications: Taylor and Mosher, The Biographical History of Anonyma and Pseudonyma, University of Chicago Press (1951); Halkett & Laing, Dictionary of Anonymous and Pseudonymous English Literature (1926); Encyclopedia Britannica, Volume 2, page 7 (Fourteenth Edition).

We start with an important premise. It is a premise because it has won the imprimatur of this court: If the utterances were oral, a statute that required identification or registration of the speaker would have run afoul of the Constitution. *Thomas* v. *Collins,* 323 U. S. 516, supports that view. In that case, a speaker was held in contempt for having spoken without complying with a court order issued under a statute that required him first to register, so that he might be identified. This court struck down that law, saying:

> "As a matter of principle a requirement of registration in order to make a public speech would seem gen-

erally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assmble and discuss their affairs and to enlist the support of others.

"If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Therefore, a speaker can get up on a platform without any identification, true or otherwise and make any statement, subject of course to the existing restraints on speech. But the point is that he does not have to identify himself.

In which way does handing out a leaflet differ from the oral statement? If the distribuutor of the leaflet were a

mute, the test is clear, for the mute merely substitutes one medium of expression for the one in which he is deficient. The answer is that both methods are media of expression, and therefore, the doctrine in *Thomas* v. *Collins* applies to written communication as well as to oral expression.

Basically, the entire concept of free speech rests on the assumption derived from centuries of scholarship and philosophy, that truth rests on its own supports for acceptance, and not on the name of its utterer. Holmes, J. in *Abrams* v. *United States,* 250 U. S. 616, Brandeis, J. in *Whitney* v. *California,* 274 U. S. 357, 375, Black, J. in *Adler* v. *Board of Education,* 342 U. S. 485, 496. Justice Black in *Talley* (p. 64) succinctly put it:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Lovell v. Griffin, 303 U. S., at 452.
>
> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions

designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

"We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. Bates v. Little Rock, 361 U. S. 516; N.A.A.C.P. v. Alabama, 357 U. S. 449, 462. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face."

See also, the concurring opinion of Justices Black and Douglas in *United States* v. *Rumely*, 345 U. S. 41, 56. In that case, Rumely was convicted of contempt of Congress for having refused to disclose to a Congressional Committee, the names of the purchasers of his books which he had on sale.

If an author were compelled to disclose his name in every case, it might deter him from publishing what may be of supreme importance to the public, especially, as in

this case, concerning political candidates and political ideas. It is this deterrence which acts as a restraint on ideas and thus violates the First Amendment. This too, should answer any query (see Justice Clark in *Talley*, p. 70) as to where in the Constitution is to be found any edict against anonymous publications.

See, The Constitutional Right to Anonymity: Free Speech, Disclosure and The Devil, 70 Yale Law Journal 1084, for a comprehensive discussion of the subject. See also, Anonymity: An Emerging Fundamental Right, 36 Indiana Law Journal 306.

There still remains to be discussed what the effect false and libelous statements would have on anonymous distribution. In considering this question, care must be taken to separate the function of anonymity from the content of speech itself: In the realm of speech this court has been careful to protect the content of speech, even if the speech is obnoxious to the audience or does not comport with current standards: *Lovell* v. *Griffin*, 303 U. S. 444; *Jameson* v. *Texas*, 318 U. S. 413; *West Virginia Board of Education* v. *Barnette*, 318 U. S. 624; *Kingsley International Pictures* v. *Board of Regent*, 360 U. S. 64; *Staub* v. *Baxley*, 355 U. S. 317; *Speiser* v. *Randall*, 357 U. S. 513.

Assuming that the Constitution does not protect the libelous or the false expression, sanctions might be formulated to provide a remedy to deal directly with those evils. But that has nothing to do with anonymity. Anonymity in such a case could only prove as a nuisance toward ascertaining the utterer, a nuisance akin to the task of an investigator in any other case where identity is sought. But should such a nuisance be enough to abolish the right and benefits of anonymity that has been history of literature from time immemorial? This court in *Schneider* v. *New Jersey*, 308 U. S. 147, had before it the question of the balancing of interests, when faced with the question whether distribution of pamphlets in the streets are to

be free as against the nuisance of littering of the streets. This court voted in favor of eliminating restraints on speech as against the possible nuisance of the streets becoming littered. There was always the remedy against the purposeful litterer as there would be against the malicious libeler, who might have to be identified with some effort. And in this connection it should not be overlooked that the use of pseudonyms, nom de plumes and false names creates as much of a nuisance of attempted detection as does the complete absence of a name. So that the remedy sought by the statute (as appellee has contended) to furnish a means of locating a malicious libeler, is illusory.

As to any argument that it is necessary there be disclosure distributed on the eve of an election, so that a candidate may be in a position to rebut, the answer is that the argument is confused. Disclosure is not a necessary part of answering back. Anonymity has nothing to do with the ability of a candidate to answer back. The candidate could answer back whether the author of obnoxious material is disclosed or not. This contention is fortified by this court's decision in *Mills* v. *Alabama*, 384 U. S. 214, where this court held unconstitutional, a statute which forbade comment on election day, if it urged people to vote in a particular manner.

Insofar as the recognized evil of fraud or palming-off is concerned, compelled disclosure is not the remedy. If, for example a Democratic candidate should broadcast a leaflet falsely signed as by a Republican with the aim of injuring the Republican candidate, the remedy is not to require disclosure of the author. The remedy is by sanctions directly against the fraud.

Punishment for anonymity provides no remedy for the supposed evil. It merely adds an additional penalty to the one that should be imposed directly. If the aim of statute is to eliminate an evil, it is thus far off target.

A falsity can be stated with or without the name of the author affixed.

It is not amiss to observe that concern about the identity of a perpetrator of seditious libel or untrue statements has been considerably watered down by this court's very recent pronouncements in *New York Times* v. *Sullivan,* 376 U. S. 254; *Garrison* v. *Louisiana,* 379 U. S. 64; *Time Inc.* v. *Hill,* 385 U. S. 374; *Mills* v. *Alabama,* 384 U. S. 214. Those cases have limited the instances in which an action for a false, libelous or untrue statement may be brought; so that the practical operation of the New York statute as an instrument to aid libel actions, is at best, minimal.

The statute under attack here, if adjudged valid with respect to false and libelous statements would only serve to involve the courts in the dark labrynths of determining the contents and character of a publication before it can approve anonymity.

But as Judge Rosling, dissenting below, put it so well, albeit cryptically, that before the judiciary makes a determination in a given case of permissible anonymity, the chilling effect on publication has aleady occurred. The courts in such a case would come into play only *after* a given event. There could be no determination of permissible anonymity *before* the publication. There could be no declaratory judgment of permissible anonymity, because the petitioner in such a case would at some stage be revealed and therefore, the effect would be to discourage resort to such a remedy. But the chilling effect of the statute upon the author would remain.

This case furnishes an excellent illustration. Zwickler had previously been arrested and prosecuted through the New York courts, all the way to the New York Court of Appeals. To put it mildly, he became chilled in his enthusiasm about future distribution. A reading of the

leaflet (R. 5-6) may raise a question whether it is libelous. It is certainly protected by the *New York Times* case because it concerns itself with the functioning of a Congressman in the performance of his public duties. Whether it can be said to be a "malicious" publication raises several serious questions, and since "malice" is so subjective (akin to "obscene"), the problems multiply. (See the concurring opinions of Justice Black and Justice Goldberg in the *New York Times* case as to the inherent difficulty of assessing "malice" of a publication.) Whose malice is involved? Is it that of the anonymous author or of Zwickler, the distributor? Assuming the author had malice, but Zwickler was innocent and public-spirited, may the leaflet be distributed anonymously? How can Zwickler know, *in advance* of distribution whether he is qualified —or that the publication is qualified? Under the circumstances, what is Zwickler to do about ascertaining his right to distribute anonymously? The answer is quite clear: he is discouraged and will not take the chance of distribution, save that the statute be stricken.

Zwickler's case undoubtedly is also the case of many others. There cannot be freedom to distribute if it is accompanied with fear. Therefore, neither he nor the courts should concern themselves with the question whether the publication is true or false as a price for publication anonymously. Removal of the hazard of distribution is indispensable to freedom of the press.

Up to this point, in arguing on the materiality of the truth or falsity of a statement in relation to anonymity, we have necessarily dealt with those parts of the statute where libel may be a factor. But the statute also speaks about statements or information concerning any "proposition or amendment to the state constitution". As to these, the question of libel cannot apply. But falsity of a statement or information would fall under the statute. We

submit the *Times Inc.* v. *Hill* case is a complete answer: that utterances cannot be penalized or restrained because they may be inaccurate or false.

II

The District Court should have retained jurisdiction and disposed of the constitutional issue.

Over the dissent of Judge Rosling (R. 39), the District Court ordered the complaint dismissed, because it decided to abstain from determining the important constitutional issue raised by appellant. Judge Rosling protested that in the light of the decisions of this court, the statute is void on its face as a restraint on expression, and is at least void for overbreadth. Therefore, he protested the district court should have passed on the constitutional question, as the decision of this court in *Baggett* v. *Bullitt,* 377 U. S. 360, and *Dombrowski* v. *Pfister,* 380 U. S. 479, have announced. He found no basis for sending the case back to the state court for adjudication while the district court abstained.

Noteworthy is the abstention of the majority in that it did not hold the case pending adjudication by the state courts, as true abstention means. Rather it dismissed the complaint. From the opinions of the majority it may be gleaned that the reasons for its decision are (1) that a remedy for the same relief may be found in the New York courts and (2) that there was no showing of violence threatened to Zwickler. Neither of these reasons can find support in the decisions of this court. They are refuted by *Baggett* and *Dombrowski.*

If the reasoning of the District Court in this case was correct, then the most recent case of *Keyishian* v. *Board of Regents,* 385 U. S. 589, should have been dismissed. In that case, a three-judge district court was convened to hear a

complaint seeking a declaratory judgment and injunctive relief against a state statute which required removal of teachers for seditious utterances. Yet, that case, involving claims as does the present one under the First Amendment, was passed upon without abstention.

Were the disposition of the majority in the district court in Zwickler's case given approval, then it would follow that any complaint in the federal court under the First Amendment which seeks a declaratory judgment and injunction against the claimed unconstitutionality of a New York statute should be dismissed, because New York courts provide a remedy in such cases.

Should Zwickler be relegated to the state court for relief by way of an action for a declaratory judgment, as suggested by the majority (in order to escape the perils of martyrdom), he would be in the same posture as in a district court. Under New York law, the remedy of declaratory judgment is a discretionary one (*Delaware Lackawanna Railroad Co.* v. *Slocum*, 299 N. Y. 496, 505, holding that the remedy is discretionary and the New York Court of Appeals will not review the exercise of discretion; also, *Newburger* v. *Lubell*, 257 N. Y. 383, *Bareham* v. *Rochester*, 246 N. Y. 140). The exercise of equitable jurisdiction by a district court is likewise discretionary.

This court, however, at least in First Amendment cases, has upheld the right of resort to the federal courts for an adjudication of the repugnancy of a state statute to the Constitution (otherwise, what purpose can be served by 28 U.S.C. 2281, which requires that a three-judge court must be convened in such cases!)

This court in *Freedman* v. *Maryland*, 380 U. S. 51, revealed its impatience with statutes that *delay* and thus inhibit the exercise of First Amendment rights. It is evident that delay in the exercise of those freedoms is often their destruction. In stating this we are reminded of *Ellis*

v. *Dixon,* 349 U. S. 458, where the delay through state litigation to this court and back again through state courts, although pursued with great diligence extended over many years. Ellis, who sought to have a meeting about the Korean war, found to his dismay, that the subject of the speech had passed into history.

Although the delays and frustrations in pursuing First Amendment freedoms are fraught with exacerbations, as Justice Reed pointed out in *Poulos* v. *New Hampshire,* 345 U. S. 395, nevertheless such a condition need not be accepted fatalistically. *Freedman* has demonstrated that delay may be eliminated, and that means may be devised wherever possible toward that end.

Were Zwickler restricted to learn his constitutional rights only after he risked prosecution in the state courts, the criminal trial, intermediate appeal and appeal to the state's highest court, if allowed, would surely delay the exercise of his right and defeat the intent of this court to preserve the right.

Zwickler should not be required to be martyr to seek relief only after a conviction. Under this statute, it will be recalled, a second conviction for handing out a leaflet is a felony. The seriousness of the restraint as well as the need for pre-arrest relief cannot be minimized. The district court realized this, when it held that the court had jurisdiction because a case and controversy exists: "It alleges a case or controversy which is within the adjudicatory power of this court" (R. 23). *Evers* v. *Dwyer,* 358 U. S. 202. See also, *Speiser* v. *Randall,* 357 U. S. 513; *Keyishian* v. *Board of Regents,* 385 U. S. 589.

Indeed, Zwickler's plight is no different in kind or degree from that of Evers in *Evers* v. *Dwyer,* 358 U. S. 202, where this court on squarely similar facts held that there was a case and controversy. Evers, it will be recalled, attempted to sit in any seat in a segregated bus. Upon his

refusal to sit in a seat designated for black persons, he was told to comply with the municipal ordinance or meet the penalties of non-compliance. Rather than comply, he left the bus and instituted an action to declare the ordinance invalid. This court expressly held that a controversy existed. Zwickler is in every respect in a similar controversy. Zwickler was prosecuted under the statute; the statute was held constitutional; and he was convicted. He seeks to distribute the anonymous pamphlet not only during the elections of 1966, but at subsequent events. He is afraid to do so, because of what had happened to him. In his case, he is not merely chilled in the exercise of his rights. He is frozen. He cannot function because of his anxieties. He did not make distribution immediately prior to the 1966 election because of fear of the existing statute. He also fears to make distribution in the future. Unless he gets protection by this litigation, he will *not* exercise his First Amendment rights. The statute thus inhibits presently and immediately with the exercise of those rights.

Moreover, it should be noted, Zwickler has greater reason to be apprehensive than Evers. Zwickler, as distinct from Evers, was actually prosecuted and had an opinion from the trial court that the law is constitutional. Zwickler, as distinct from Evers, had the district attorney pursue him by the People's appeal to the New York Court of Appeals.

As to any contention that this case is now moot because the 1966 election passed during this litigation (a confirmation of the observations above made on the delays in exercising First Amendment rights), the complaint as well as the District Court show that Zwickler is not seeking to enforce his First Amendment rights only with respect to the election of 1966, but "subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign. Such distribution is in-

tended to be made in quantities of more than a thousand copies of such anonymous leaflet" (Complaint, par. "Fourteenth" (R. 3) and Opinion (R. 20.) It could not be seriously contended that Zwickler should be required to institute an action before each intended distribution. All of which emphasizes that it is necessary that relief be afforded in this case, because the attrition of litigation presupposes the passage of time.

The District Court should have afforded relief in accordance with this court's admonitions in *Dombrowski.* In that case an action was brought in a district court for a declaratory judgment and injunction against a state statute which it was claimed violated First Amendment protections. It should be noted that in *Dombrowski* a factor existed *which does not exist here,* that prosecution had been begun in a state court and the action sought to enjoin it, what with 28 U.S.C. Section 2283 and *Stefinelli* v. *Minard,* 342 U. S. 117, standing to thwart such a remedy. Yet despite those obstacles, this court held that Dombrowski's action was warranted. Said this court:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., Smith v. California, 361 U. S. 147, 4 L. ed 2d 205, 80 S. Ct. 215. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U. S. at 379, 12 L. ed 2d at 389. For '(t)he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .' NAACP v. Button,

371 U. S. 415, 433, 9 L. ed 2d 405, 418, 83 S. Ct. 328. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendant value to all society, and not merely to those exercising their rights—might be the loser. Cf. Garrison v. Louisiana, 379 U. S. 64, 74-75, 13 L. ed 2d 125, 132, 133, 85 S. Ct. 209. For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Thornhill v. Alabama, 310 U. S. 88, 97-98, 84 L. ed 1093, 1099, 1100, 60 S. Ct. 736; NAACP v. Button, supra, 371 U. S. at 432-433, 9 L. ed 2d at 417, 418; cf. Aptheker v. Secretary of State, 378 U. S. 500, 515-517, 9 L. ed 2d 992, 1002, 1003, 84 S. Ct. 1659; United States v. Raines, 362 U. S. 17, 21-22, 4 L. ed 2d 524, 529, 80 S. Ct. 519. We have fashioned this exception to the usual rules governing standing, see United States v. Raines, supra, because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a panel statute susceptible of sweeping and improper application.' NAACP v. Button, supra, 371 U. S. at 433, 9 L. ed 2d at 418. If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardly enough to risk criminal prosecution to determine the proper scope of regulation. Cf. Ex parte Young, supra, 209 U. S. at 147-148, 52 L. ed at 723, 724. By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not

thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. See NAACP v. Button, supra, 371 U. S. at 432-433, 9 L. ed 2d at 417, 418; cf. Baggett v. Bullitt, supra, 377 U. S. at 378-379, 12 L. ed 2d at 389; Bush v. New Orleans School Board, 194 F Supp 182, 185, affirmed sub nominibus Tugwell v. Bush, 367 U. S. 907, 6 L. ed 2d 1250; 81 S. Ct. 1926, Gremillion v. Bush, 368 U. S. 11, 7 L. ed 2d 75, 82 S. Ct. 119."

Although *Dombrowski* held that it was improper for a district court to abstain when a statute is attacked on its face as abridging free expression, nevertheless, the District Court here felt that *Dombrowski* did not apply because the key to *Dombrowski* was the showing of violence. We believe this is a mistaken view of *Dombrowski,* as Judge Rosling asserted in dissent. There was no violence in *Baggett* or in *Keyishian.* Yet relief in the federal courts was afforded in those cases merely by a claim that the statute attacked was repugnant to the protections of the First Amendment. See also, *Cameron* v. *Johnson,* 381 U. S. 741; *Reed Enterprises* v. *Corcoran,* C.A.D. of C. December 2, 1965, 354 Fed. 2d 519; *Interstate Circuit, Inc.* v. *City of Dallas,* No. 978, October Term, 1966; *Carr* v. *Baker,* 369 U. S. 186, *Chelton* v. *Tucker; Davidowitz* v. *Hines,* 312 U. S. 52; *Dombrowski* v. *Pfister:* Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Relations, 34 Fordham Law Review 71.

With respect to *Douglas* v. *City of Jeannette,* 319 U. S. 157, upon which the District Court relied: Although *Dombrowski* has minimized its force, it seems that in discussions of that case there has been an oversight of the fact that what has been quoted from it is *dicta.* That case stands for the proposition—and we follow the rule that a

case stands for what it decides—that because equity does not perform a useless task, relief will not be granted under circumstances of futility. In that case, on the very day it was decided, this court in *Murdock* v. *Commonwealth of Pennsylvania,* 319 U. S. 105, held unconstitutional, the very same ordinance involved in the *Douglas* case. This court therefore said (p. 165) "in view of the decision rendered today in *Murdock, et al.* v. *Pennsylvania, supra,* we find no ground for supposing that the intervention of a federal court, in order to secure petitioner's constitutional rights, will be either necessary or appropriate". Under the circumstances we respectfully urge that the *Douglas* case is neither apposite or authority in a case such as the instant one, where the invalidation of a statute is sought for the first time.

If it be a prerequisite for the exercise of jurisdiction, that it first be demonstrated that the statute infringes First Amendment rights, then the appellant has complied, because we have argued, we believe persuasively, that the statute even if construed to apply to obnoxious literature is unconstitutional and that a remedy, if any, lies against the substantive act, rather than against the anonymity of the publication.

In the text of this discussion we offer this commentary: when it is said that it must first be shown that a statute is invalid on its face, in order to be eligible for the exercise of jurisdiction, a perplexing anomaly is stated. Actually, the requirement puts the car before the horse. It in effect means that a court will not entertain a case unless it be first shown to the court conclusively that the statute is invalid. A court thus will decide whether to accept the case for decision only after it has already decided the merits of the case. To overcome this incongruity, is it not better if the rule be stated (as we gather from *Baggett, Dombrowski* and *Keyishian*): that whenever a state statute is attacked on its face as abridging free

speech that a district court is required to exercise jurisdiction? Compare *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 328, where the right to deliver liquor at an airport was adjudicated by a three-judge court upon a claim of the repugnance of a state statute.

We augment our argument of the needs of an expeditious remedy in the federal courts of declaratory judgment and injunction, by the very recent decision of this court on June 12, 1967 in *Jacobs* v. *New York*, —— U. S. ——, 18 L. ed. 1294. There, this court dismissed an appeal from a judgment of conviction because the time in which the sentence could be executed, had expired. As Chief Justice Warren and Justice Douglas pointed out, that decision is a serious blow to free-speech appeals, for very few can work their way through the state courts in time to be reviewed by this court. And Justice Douglas was prophetic: "If a practice such as this were shown to exist, its *in terrorem* effect on all publishers would certainly be sufficiently clear as to give any of them standing to bring an action for declaratory relief." And since it is so important in speech cases that there be a speedy determination lest speech be defeated, only the expeditious remedy of a three-judge court with a direct appeal to this court will give insurance against *in terrorem* statutes that are attacked on their face as abridgements of speech.

It can readily be discerned that relegating Zwickler (as the appellee has urged below) to a remedy only after another conviction for his offense would enmesh him beyond ability to have this court pass on the validity of the statute that stands in his way to the freedom of expression. And it is worthy to repeat, that a second conviction under the statute is a felony, with its attendant disabilities.

III

The judgment in this case should be a final one.

At the hearing before the three-judge court, counsel had stipulated that the hearing be treated as one for a final judgment, no questions of fact being in dispute (R. 17-18). Inadvertently, the decision of the District Court (R. 31) did not conform to the stipulation; and the order likewise did not correspond (R. 34). Under the circumstances, the stipulation should prevail, and be considered by the court in disposing of this appeal.

Conclusion

This court has become wary of attempts to delay the exercise of First Amendment rights. By the decision of the District Court, Zwickler has been whipsawed between the state courts and the federal courts. Zwickler was pursued by prosecution through all state courts. He then turned to the federal courts for relief. The federal court agreed it had jurisdiction to grant him relief. But it refused to grant it, and told him to go back again to the state courts for relief. Such a state of affairs, especially in an important First Amendment challenge, does not comport with this court's concept of an expeditious handling of free-speech cases.

For the reasons stated, it is respectfully submitted that the order of the court below should be reversed and that this court, itself, should grant the relief appellant seeks.

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